SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
General traverse	5	3
Argument and submission of case	5	3
Special findings of fact	6	4
Conclusion of law	8	7
Opinion of the court, Whaley, J.	9	8
Judgment	13	13
Proceedings after entry of judgment	13	13
Clerk's certificate (omitted in printing)	14	
Order allowing certiorari		15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 9, 1933

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

L. 187

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS,
Claimant,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed May 20, 1930

To the Honorable the Court of Claims and to the Honorable the Judges Thereof:

The claimant, R. H. Stearns Company, by this, its petition, respectfully shows:

1. The R. H. Stearns Company is a corporation incorporated December 17, 1915, under the laws of the State of Massachusetts, and has its principal place of business at 140 Tremont Street, Boston, Massachusetts.

2. The claimant has a just claim against the defendant for $14,928.07, Federal Income and Profits taxes overpaid [fol. 2] for the year 1918, and instead of refunding same it was illegally credited against an alleged additional tax for the period ended July 31, 1917.

3. R. H. Stearns Company filed its income and profits tax return for the year ended July 31, 1918, on or about October 15, 1918, and paid taxes thereon in the amount of $170,040.23. Thereafter, on or about June 28, 1924, the Commissioner of Internal Revenue filed and allowed an overpayment in the amount of $14,928.07.

4. Thereupon, the Commissioner of Internal Revenue instead of refunding said overpayment to the claimant, erroneously and illegally credited same against alleged additional taxes for the year July 31, 1917.

5. The income and profits tax return of the R. H. Stearns Company for the year 1917 was filed on or about October 15, 1917.

6. The aforesaid overpayment of $14,928.07 for the year 1918 was credited against the additional taxes for the year 1917 on to-wit June 28, 1924, more than five years after the return for 1917 was filed.

7. Claims and demands have been filed with the Commissioner of Internal Revenue for the refund of the aforesaid $14,928.07, but the said Commissioner refuses to make and has not made said refund.

8. Section 609 (a) of the Revenue Act of 1928 provides that:

"Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607."

Section 607 of the Revenue Act of 1928 provides that:

[fol. 3] "Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claims."

Section 277 (a) (2) of the Revenue Act of 1924 and Section 277 (a) (3) of the Revenue Act of 1926 provide that:

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes,' approved August 5, 1908, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

9. The claimant has at all times borne true allegiance to the Government of the United States. It has not in any

way voluntarily aided, abetted or given encouragement to rebellion against such Government. The claimant is the sole and absolute owner of the claim here presented. The claimant has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

[fol. 4] 10. The claimant believes the facts as hereinabove stated to be true.

Wherefore, the claimant prays judgment in its favor against the United States of America for the sum of $14,928.07 with such interest and costs as are allowable by law.

R. H. Stearns Company, by R. W. Maynard, Pres.
William N. Wood, Attorney for Claimant, Woodward Building, Washington, D. C.

Duly sworn to by R. W. Maynard. Jurat omitted in printing.

[fol. 5] II. General Traverse—Filed June 28, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles B. Rugg, Assistant Attorney General.

III. Argument and Submission of Case

On June 6, 1932, this case was argued and submitted on merits by Mr. Howe P. Cochran, for the plaintiff, and by Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 6] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Whaley, J.**—Filed March 13, 1933

Mr. Howe P. Cochran for the plaintiff. Messrs. William N. Wood and Frederick S. Winston were on the briefs.

Mr. Assistant Attorney General Charles B. Rugg for the defendant. Messrs. Charles R. Pollard and Joseph H. Sheppard were on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Plaintiff is a corporation, organized December 17, 1915, under the laws of the State of Massachusetts, with its principal place of business at 140 Tremont Street, Boston, Massachusetts.

2. On September 29, 1917, plaintiff filed with the collector of internal revenue its income tax return for the fiscal year ending July 31, 1917, disclosing a tax of $7,863.88, which was assessed and on January 14, 1918, paid in full.

On the same date, to wit, September 29, 1917, plaintiff filed with said collector its profits tax return for the fiscal year ending July 31, 1917, disclosing a tax of $9,369.32, which was assessed, and on January 14, 1918, paid in full.

The total of these two assessments was $17,233.20.

3. By reason of increased rates in the war revenue act of 1917, plaintiff, on April 10, 1918, filed another tax return for income and profits for the fiscal year ending July 31, 1917, disclosing a revised income and profits tax, combined, of $20,055.03, an increase of $2,821.83. Thereafter certain corrections in computation of the tax were made, whereby the tax under the war revenue act was increased to $27,918.80, a further increase of $7,863.77. The aggregate increase was $10,685.60, which was assessed and on June 7, 1918, paid in full.

The Bureau of Internal Revenue made an audit of plaintiff's returns for the fiscal year ending July 31, 1917, and as a result assessed the plaintiff an additional sum of $10,402.36, which was paid in full October 15, 1920.

[fol. 7] 4. Plaintiff filed its income and excess profits tax return for the fiscal year ended July 31, 1918, under the revenue act of 1917, on October 29, 1918, and on June 19, 1919, it filed its income and profits tax return for the same

year under the revenue act of 1918. The tax shown due on such returns was duly assessed and paid.

5. On February 19, 1921, plaintiff signed and filed with the Commissioner of Internal Revenue an instrument in writing which stated that plaintiff, "in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the act of Congress, approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered * * *."

The Commissioner of Internal Revenue, at that time D. H. Blair, endorsed his approval thereon February 6, 1923. According to regulations of the Commissioner of Internal Revenue promulgated on or about April 11, 1923, this so-called "unlimited waiver" expired April 1, 1924.

6. On February 19, 1923, plaintiff signed and filed with said commissioner the following instrument in writing:

"In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, R. H. Stearns & Company, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due in any return made by or on behalf of the said company for the fiscal years ending July 31, 1917, and July 31, 1918, under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, irrespective of any period of limitations provided that determination and assessment is made within two years from March 1, 1923, and provided further that such determination and assessment shall not be made except after deliberate, intensive, and thorough consideration, and not on superficial determination of the true liability."

The commissioner's signature thereto was subscribed by an authorized officer April 7, 1930. The Commissioner of Internal Revenue April 7, 1930, was Robert H. Lucas, and his term as commissioner extended from June 1, 1929, to August 15, 1930.

7. In June, 1923, the commissioner assessed against plaintiff a still further amount of $22,189.10 for the fiscal year ending July 31, 1917.

The commissioner signed and certified this assessment June 26, 1923, and on the assessment listed attached thereto was the following notation opposite the item of $22,189.10 pertaining to plaintiff: "7/31/17 Fisc 1753361 OL 4/17/23 Waiver." There has been no offer of proof as to what particular document the word "waiver" had reference. The same schedule also contained the following notation: "Collector: Withhold demand pending comparison with schedule [fol. 8] of overassessment (Form 7805) No. 6246."

8. On or about July 12, 1923, the commissioner certified an overassessment in favor of plaintiff for the fiscal year ending July 31, 1916, of $1,431.96. This was applied by the collector against the unpaid balance of $22,189.10 on taxes for the fiscal year ending July 31, 1917, reducing said balance to $20,757.14, payment of which was demanded by the collector August 3, 1923.

9. On August 9, 1923, the plaintiff filed with the commissioner a claim for refund and credit of income tax alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920, and 1921, in a total amount of $35,727.10, asking that of this amount $20,757.14, the unpaid balance for the fiscal year ending July 31, 1917, be set off against the claim for overpayment of $35,727.10, and the remainder, $14,969.96, be refunded.

It was the practice in the collector's office at the time this claim for refund and credit was filed, to treat such claims as a stay of collection of the unpaid taxes against which the credit was sought to be applied, until the commissioner had considered and adjusted the claim.

10. On March 1, 1924, the commissioner approved a schedule of overassessments, including an overassessment in favor of plaintiff of $14,928.07 for the fiscal year ending July 31, 1918, and transmitted it to the appropriate

collector for his action in accordance with the directions appearing thereon. The collector complied with the commissioner's instructions and on June 12, 1924, signed and returned said schedule to the commissioner, together with a schedule of refunds and credits, certifying the application of the said amount of $14,928.07 as a credit. The commissioner signed the said schedule of refunds and credits June 28, 1924, on which appeared the credit in favor of plaintiff of $14,928.07, and the commissioner on or after March 1, 1924, transmitted to plaintiff a certificate of overassessment of the foregoing amount for the fiscal year ending July 31, 1918. The said overpayment of $14,928.07 for the fiscal year ending July 31, 1918, was thus applied as a credit in partial extinguishment of the remaining liability of $20,757.14 for the fiscal year ending July 31, 1917, thereby reducing said liability to $5,829.07.

11. The collector, on September 1, 1924, issued a demand on plaintiff for payment of the final balance of $5,829.07, with accrued interest of $403.18. These two amounts were paid by plaintiff September 15, 1924.

12. On May 16, 1930, plaintiff filed with the commissioner claims for refund for the fiscal years ending July 31, 1917, and July 31, 1918, each in the amount of $14,928.07, on the ground that said amount had been illegally assessed and also illegally collected after the statutory period of limitation therefor had expired, and that there were no valid waivers on file with the commissioner.

13. There is no evidence that at any time the Commissioner of Internal Revenue requested of or suggested to plaintiff that waivers be filed.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to re-
[fol. 9] cover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

WHALEY, Judge, delivered the opinion of the court:

The plaintiff brings this suit to recover an overpayment of $14,928.07 found by the commissioner due the plaintiff for the taxable year 1918 and applied to a deficiency for the year 1917. At the time of the application the plaintiff had filed a waiver signed by it, but the signature of the commissioner was not placed thereon until several years after the tax liability for the years in question had been finally adjusted.

For the fiscal years 1917 and 1918 plaintiff filed its income and income and profits tax returns and paid the taxes therein disclosed. The five-year period provided for in sec. 250 (d) of the revenue act of 1921, in which collection could be made for any additional assessment on the 1917 return, expired April 10, 1923, "unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax."

In February, 1921, the plaintiff executed an unlimited waiver, and the commissioner signed this waiver on February 6, 1923. This waiver expired on April 1, 1924, under the provisions of the commissioner's mimeograph letter 3085 (Cumulative Bulletin II-1, p. 174).

The five-year limit on the 1918 return for additional assessment expired June 19, 1924. The plaintiff, therefore, on February 19, 1923, executed another waiver covering both the year 1917 and the year 1918 and, instead of being unlimited in time, expired by its terms on March 1, 1925. On June 26, 1923, the Commissioner of Internal Revenue made an additional assessment against the plaintiff for the fiscal year ended July 31, 1917, in the sum of $22,189.10. Following this assessment the plaintiff filed on August 9, 1923, a claim for refund and credit for the four fiscal years, commencing August 1, 1917, and ending July 31, 1921.

After an audit of the various years covered by the claim for refund and credit, the commissioner on March 1, 1924, one month before the first waiver had expired, and within the period of the second waiver, approved a schedule of overassessments, including an overassessment in favor of plaintiff for $14,928.07, and transmitted it to the appropriate collector for action in accordance with the directions appearing thereon. On June 12, 1924, the collector re-

turned the said schedule with his certification of the application of the credit in accordance with instructions and also forwarded to the commissioner at the same time a schedule of refunds and credits on which the said overpayment in favor of plaintiff was shown as having been credited. The commissioner signed the schedule of refunds and credits June 28, 1924, and transmitted a certificate of overassessment to plaintiff. The said overpayment was thus applied as a credit against the remaining unpaid tax liability for the fiscal year ending July 31, 1917, reducing the outstanding liability for that year to $5,829.07 which was paid September 15, 1924, after a second notice and [fol. 10] demand on September 1, 1924. The commissioner's signature was not placed on the waiver of February 19, 1923, until April 7, 1930.

On May 16, 1930, the plaintiff filed two claims for refund, each in the amount of $14,928.07 for the fiscal years ended July 31, 1917, and July 31, 1918, respectively.

The sole contention of the plaintiff is that the signature of the commissioner, having been placed on the waiver many years after the period for assessment and collection, was ineffective for the validation of such collection. The purpose of a waiver is to extend the time fixed by statute in which an assessment and collection could be made by the commissioner and the desire of the taxpayer in executing it is to have his returns carefully and deliberately examined and audited for the years in question so he can receive the benefit of any errors, overassessments, and corrections of alleged underpayment. The statute does not require or demand that the actual waiver executed by plaintiff be signed by the commissioner. It only provides both commissioner and taxpayer consent in writing to a later determination, assessment, and collection.

When the additional assessment was made June 26, 1923, the statute had not run even under the first waiver, which did not expire until April 1, 1924, and collection could, and undoubtedly would, have been then made had it not been for the action of plaintiff in filing a claim for refund and credit in August, 1923, at or about the time demand was being made for the payment of the tax. As a result of the filing of the claim, a consideration of which necessitated an examination of plaintiff's returns for four years beginning in 1917 and ending in 1921, and thus might well have re-

quired, and did require, more time than remained until the first waiver expired, it is certainly reasonable to say that in such consideration the commissioner relied upon the second waiver which was then on file.

It is thus evident that plaintiff benefited, at its own request, by the actions of the commissioner under the second waiver. Collection of $20,757.14 was withheld from August, 1923, until September, 1924, when, as a result of the application of the credit, plaintiff had to pay only $5,829.07. The first waiver included only the year 1917 and the second waiver included both 1917 and 1918; clearly the commissioner acted under the greater which included the lesser in the number of taxable years and in time extension. The plaintiff derived an advantage by the execution of the waiver. In the case of Liberty Baking Company v. Heiner, 37 Fed. (2d) 703, the court said:

"* * * it would be unconscionable to allow the taxpayer to afterwards repudiate a consent upon which the commissioner has acted and relied. It appears that, in the circumstances, the execution of the waivers was a necessary incident to the securing of further consideration of the plaintiff's tax liability."

The plaintiff in this case accepted the benefits of the commissioner's acts under the waiver and, for almost seven years did nothing to indicate the lack of the signature of the commissioner on the waiver before its expiration in any way affected its binding effect. It was not until the signature of the commissioner was placed on the waiver more than six years after the collection had been made that the plaintiff filed a refund claim for the amount of the overassessment for the fiscal year 1918, and within four days thereafter suit was commenced in this court. The [fol. 11] statutory period of six months in which the commissioner has to pass on a refund claim before suit can be commenced was ignored. The suit is based on an account stated. Bonwit-Teller Co. v. United States, 283 U. S. 258.

If the waiver given on February 19, 1923, is valid and binding all the acts of the commissioner are timely and proper. In our opinion the contention of the plaintiff is without merit and most technical in nature and effect. There is nothing in the statute which requires the commissioner to give his consent in any particular time or

period to the waiver. It is not disputed that he did sign the waiver. The contention is his signature was not placed thereon until the extension period named in the waiver had expired. But when settlement was made and for many years afterwards while the waiver was without the actual signature of the commissioner, the plaintiff did not complain; on the contrary, it accepted the benefits under the waiver, and no action was taken until the signature was attached years afterwards.

In Eclipse Lawn Mower Co. v. United States, No. K-40, decided by this court November 14, 1932, the proof was that a waiver had been filed in response to a written request by the commissioner and had been misplaced and could not be produced in evidence. The assessment list, as in the instant case, was endorsed "waiver." The court held that the signing of the assessment list by the commissioner with the endorsement "waiver" on it was sufficient under the statute. In the present case the assessment list contained the word "waiver." It is contended that only the first waiver was meant by the use of this word. But we can see no reason for such an implication and restriction of its use. Both waivers were on file at the time and the second waiver included both years under controversy, and, in our opinion, the intendment by the use of the word applied to the second and not to the first waiver which only covered the one year.

In Sabin v. United States, 70 C. Cls. 574, this court held valid a waiver which the taxpayer had attempted, by written instrument, to revoke prior to the endorsement thereon of the commissioner's approval. The court said:

"The statute does not require that a consent, in order to be valid, must be in one instrument or that it shall be in any particular form. All that is required is that the consent be evidenced in writing. * * *

"The statute requires no more than that there shall be written evidence of the fact that both parties understand that the limitation period specified in the statute is not to govern the matter and, therefore, that when a date to which the period has been extended is specified there shall be a complete understanding about it. No date was specified in the waiver in this case but the writings leave no doubt as to the understanding of the parties that the period specified in the statute was not to control."

In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. But by some mysterious channel, after six years, the plaintiff learns the commissioner has placed his signature to the waiver and then for the first time he complains about what [fol. 12] was the understanding. No complaint was made while his signature was lacking.

A taxpayer can execute a voluntary waiver after the statutory limitation has expired. Stange v. United States, 68 C. Cls. 395, 282 U. S. 270.

In the case of Trustees for Ohio & Big Sandy Coal Co., 43 Fed. (2d) 782, the court in commenting on a waiver given after the bar had allegedly fallen, said:

"As to the signing of the written waivers by the commissioner, all that is required by the statute is that the commissioner and taxpayer consent in writing to the extension. * * * But, apart from this, the taxpayer, by the execution of the waiver, has obtained delay in the assessment of additional taxes and a more deliberate and thorough consideration of the questions involved. Under such circumstances the taxpayer ought not be heard to urge the bar of the statute, which it expressly agreed to waive."

In Commissioner v. Hind, 52 Fed. (2d) 1075 (Circuit Court of Appeals for the 9th Circuit), the court held that a waiver being a unilateral agreement did not require the signature of the commissioner to give it effect. It is unnecessary for us to follow this decision to the extent it goes because in the case before us the commissioner did sign the waiver although many years had elapsed after its expiration. The signature of the commissioner having been given to the waiver together with the other circumstances of the case, we believe, and so hold, that the acts of the commissioner were valid and proper under a consent in writing by both parties.

The facts in the case of Mosier v. Goodcell, 49 Fed. (2d) 391, are very similar to the facts in this case and in the Mosier case the court held:

"It would seem by the decisions that the written approval by the Internal Revenue Commissioner is not

deemed indispensable to the validity of a waiver. As was said in Stange v. United States, hereinabove cited: 'A waiver is not a contract, and the provision requiring the commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by a taxpayer.' Also in Aiken v. Burnet, above cited: 'The requirement in section 250 (d) of that act that the commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract for waivers.' It should be held, in my opinion, that where a taxpayer deposits with the Internal Revenue Commissioner a written waiver in due form and that waiver is accepted and acted upon, the date when the commissioner actually indorses thereon his written approval does not change the date when the waiver becomes effective."

In our opinion the petition should be dismissed. It is so ordered.

Williams, Judge; Littleton, Judge, and Green, Judge, concur.

Booth, Chief Justice, took no part in the decision of this case on account of illness.

[fol. 13] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 13th day of March, A. D. 1933, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On April 6, 1933, the plaintiff filed a motion to modify the Court's opinion.

On May 8, 1933, the court overruled said motion.

[fol. 14] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,736. Court of Claims. Term No. 133. R. H. Stearns Company, Boston, Massachusetts, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1933. File No. 133, O. T., 1933.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4052)